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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re M.C., a Person Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

BARRY F.,

Defendant and Appellant.

D054735

(Super. Ct. No. J516247B)

APPEAL from a judgment of the Superior Court of San Diego County, Laura J. Birkmeyer, Judge. Affirmed.

Barry F. appeals the judgment terminating his parental rights over M.C. Barry contends the juvenile court found he was an alleged father rather than a biological father, depriving him of due process and standing to contest termination of his parental rights, and the San Diego County Health and Human Services Agency (the Agency) did not

comply with the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). We affirm.

BACKGROUND

M.C. tested positive for cocaine when she was born in January 2008. In July the Agency filed a dependency petition alleging M.C.'s mother, Stacey C., and M.C.'s alleged father, A.C., used cocaine, and their parental rights to an older child had been terminated. M.C. was detained in foster care.

Before the petition was filed, Stacey and A.C. told the Agency they were married and A.C. was M.C.'s father. At the detention hearing, Stacey named Barry as a possible father. She did not know whether he had any Indian heritage.¹ The juvenile court appointed counsel for Barry. Little was known about Barry except that he might be in prison.

The Agency did not locate Barry in prison. In August 2008 the court found the Agency had conducted a reasonable search for him. The court granted Barry's counsel's request to be relieved, made a true finding on the petition, ordered M.C. placed in foster care, and set a Welfare and Institutions Code² section 366.26 hearing. The court found ICWA did not apply but said it would reconsider the finding if more information became available.

¹ Although Stacey claimed both she and A.C. had Choctaw heritage, in 2007 the court found ICWA did not apply in the case of their older child.

² All further statutory references are to the Welfare and Institutions Code.

On September 15, 2008, Barry was personally served, in prison, with notice of the section 366.26 hearing. In October the court received a letter from him requesting appointed counsel. The court reappointed counsel for Barry, sent him a copy of the dependency petition and ordered him produced from prison for the hearing. On October 17 Barry filed a Statement Regarding Parentage form. He checked boxes on the form signifying requests for appointed counsel, paternity testing and presumed father status.³ In December Barry waived his right to be present at the section 366.26 hearing. On January 8, 2009, the court granted his attorney's request for expedited paternity testing. Paternity testing took place in January and February.

At the February 20, 2009, section 366.26 hearing, the court received Barry's paternity test results into evidence. The test showed a 99.99 percent probability that Barry was M.C.'s father. Barry's counsel asked for a continuance. She said she was "not prepared to request that the court make a biological finding for" Barry because she had not discussed the test results and their consequences with him. The court denied the continuance request⁴ and found Barry was an alleged father. It found it would be detrimental to M.C. to place her with Barry because he was in prison and unable to assume custody. The court rejected Barry's counsel's argument that M.C. was not

³ Barry did not complete the portions of the form eliciting facts showing he was a presumed father.

⁴ The court noted Barry had requested paternity testing four months earlier, shortly after counsel was reappointed, and the test results could have been anticipated and discussed before the results were known.

Barry does not challenge the continuance denial.

adoptable, found M.C. was adoptable and that no exception to termination of parental rights applied, and terminated parental rights.

DISCUSSION

Barry contends the court erred by terminating parental rights because the Agency had not complied with ICWA notice requirements. He also contends the court's finding he was an alleged father rather than a biological one deprived him of due process and of standing to raise the ICWA notice issue and termination of parental rights issue.

"The termination of parental rights may be challenged on the ground of lack of ICWA notice by the dependent child, a parent or Indian custodian from whose custody the child was removed, and the Indian child's tribe. [Citations.] The ICWA defines 'parent' as 'any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom.' [Citation.] The ICWA expressly excludes from the definition of 'parent' an 'unwed father where paternity has not been acknowledged or established.' [Citations.]" (*In re Daniel M.* (2003) 110 Cal.App.4th 703, 707-708.)

Through counsel, Barry expressly declined to have the court make a finding he was M.C.'s biological father. This declination prevents his attempt to acknowledge or

establish paternity and to pursue his earlier request for presumed father status.⁵ Barry chose the course that led to his lack of standing to raise the ICWA issue.

Furthermore, Barry was not denied due process. Although he waived his right to be present at the section 366.26 hearing, the court allowed him, through counsel, to participate fully in the hearing. Although the record would not support a claim of presumed father status, the court accorded Barry all the rights due a presumed father. Barry's counsel argued an issue—adoptability—that only a presumed father would have standing to raise. The court found it would be detrimental to M.C. to place her with Barry, a finding necessary only for a presumed father. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 451.) "[A] biological father's rights are limited to establishing his right to 'presumed' father status, and the court does not err by terminating a biological father's parental rights when he has had the opportunity to show presumed father status and has not done so." (*In re Ninfa S.* (1998) 62 Cal.App.4th 808, 811.) An alleged father's rights are limited to attempting to establish his paternity. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 179.)

Barry argues the Agency "unilaterally blocked" him from establishing any exception to adoption (§ 366.26, subd. (c)) by delaying paternity testing and prohibiting him from having contact with M.C. pending the test results. Barry points to nothing in the record showing he requested or was denied contact with M.C.

⁵ A man who has not married or attempted to marry the child's mother, and who has not signed a voluntary declaration of paternity, may become a presumed father by receiving the child into his home and openly holding her out as his child. (*In re Jason J.* (2009) 175 Cal.App.4th 922, 932.) Barry had the burden of establishing presumed father status. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1652-1653.)

DISPOSITION

The judgment is affirmed.

MCDONALD, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.